

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA K. PURDY

Claimant

VS.

KANSAS REHABILITATION HOSPITAL

Self-Insured Respondent

Docket No. 1,058,490

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the September 5, 2013, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on December 17, 2013. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Ryan Weltz of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant's June 14, 2011, accidental injury arose out of and in the course of her employment with respondent and was the prevailing factor causing claimant's injury, medical condition, and functional impairment. The ALJ elected to give equal deference to the ratings provided and found claimant has a functional impairment of 9.66 percent to the left upper extremity. Further, the ALJ found it is more likely than not claimant's left arm pain will require future medical treatment.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant failed to sustain her burden of proving she suffered a compensable accidental injury which was the prevailing factor giving rise to any injury, need for treatment, or permanent impairment of function. In the alternative, should claimant's injury be found compensable, respondent maintains the medical evidence supports, at most, a one percent permanent impairment to the left elbow. Respondent argues claimant is not entitled to future medical treatment.

Claimant contends the evidence proves she suffered a compensable accidental injury which was the prevailing factor in her need for medical treatment and disability.

Moreover, claimant argues the medical evidence supports a 21 percent permanent impairment to the left upper extremity. Claimant maintains the only uncontroverted opinion in evidence suggests it is more probably true than not true future medical treatment will be necessary.

The issues for the Board's review are:

1. Was claimant's June 14, 2011, accidental injury the prevailing factor causing claimant's injury, medical condition, and disability?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to future and unauthorized medical care?

FINDINGS OF FACT

Claimant has been employed with respondent for six years as a nutritional aide, attending to the nutritional needs of patients. Claimant had a prior workers compensation claim with respondent regarding a left rotator cuff tear requiring surgery in 2010. Claimant testified her condition following her June 14, 2011, accidental injury did not affect her left rotator cuff tear.

On June 14, 2011, claimant was collecting dishes in the patient cafeteria with a wheeled dish cart. Claimant testified the dish cart weighs approximately 200 pounds. Claimant stated she felt abrupt pain in her left arm while pulling the cart toward her body. Claimant notified her supervisor of the pain.

Claimant was seen by various doctors for treatment, including Drs. Garrett, Lapse, and Stechschulte. Claimant was provided pain medications, steroid injections, and physical therapy sessions. Claimant also underwent multiple x-rays and MRIs, all of which demonstrated no abnormalities.

Dr. Vito J. Carabetta performed an independent medical evaluation of claimant at the court's request on June 20, 2012. Claimant presented with upper left arm pain, which she described as a band of burning pain encircling the left arm about halfway between the shoulder and the elbow. After reviewing claimant's medical records, medical history and performing a physical examination, Dr. Carabetta diagnosed claimant with left upper arm pain.

Dr. Carabetta wrote claimant's diagnostic work-up was complete with no specific identifiable pathology, and therefore, claimant had reached maximum medical improvement. Further, Dr. Carabetta noted there were no objective findings upon which

to gauge claimant's condition and utilize the *AMA Guides*.¹ Dr. Carabetta assessed a one percent impairment of the left upper extremity at the level of the upper arm based upon claimant's subjective complaints alone. He indicated this rating was separate from any rating claimant may have had for her previous left shoulder injury.

Dr. Daniel D. Zimmerman, a board certified independent medical examiner, examined claimant at her counsel's request on July 20, 2012. Claimant presented with left arm pain. Claimant also indicated to Dr. Zimmerman she had weakness and fatigue in the left arm and elbow with swelling affecting her left arm. Dr. Zimmerman diagnosed claimant with left triceps strain and medial lateral epicondylitis after reviewing her medical history, medical records, and performing a physical examination. Further, Dr. Zimmerman opined that while claimant is at maximum medical improvement, it is more probably true than not true additional medical treatment provided by a licensed physician will be necessary in the future. Dr. Zimmerman recommended the use of non-steroidal anti-inflammatory medication, steroid injections and heat therapy to manage claimant's pain.

Using the *AMA Guides*, Dr. Zimmerman opined claimant sustained a 21 percent impairment to the left upper extremity at the level of the elbow. He based 1 percent of this rating on a range of motion restriction at the elbow level, and he based the remaining 20 percent on claimant's 51 percent grip strength deficit. Dr. Zimmerman noted claimant is capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis with the left upper extremity. Dr. Zimmerman recommended claimant avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding, and reaching activities with the left upper extremity.

Dr. Zimmerman noted "the prevailing factor for the left triceps strain with current findings consistent with medial and lateral epicondylitis is the work-related injury that occurred on June 14, 2011, in carrying out work duties as a Dietary Aid in [claimant's] employment for [respondent]."²

In an Order dated November 2, 2012, Dr. Terrence Pratt was appointed by the ALJ to perform an independent medical evaluation of claimant. Dr. Pratt met with claimant on December 28, 2012, and reviewed her medical history, medical records, and performed a physical examination. Claimant's chief complaint was a continuous dull pain, posterolateral distal aspect of her left arm. Claimant also reported the area can swell, burn, and at times is warm and can be numb. Dr. Pratt opined claimant achieved maximum medical improvement. He did not have any additional recommendations for

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Zimmerman Depo., Ex. 2 at 6.

future medical treatment, though he did recommend claimant limit her maximum pushing or pulling to 80 pounds.

Dr. Pratt indicated claimant had no significant loss in range of motion at the elbow, no significant loss in motor function, inconsistent grip strength, and no consistent loss in sensory function. Dr. Pratt noted:

Based on all of the information, [claimant] has soft tissue involvement near the region of the triceps and distal arm level on the left as well as involvement near the elbow with prior findings and still today findings that would suggest involvement near the epicondylar area or epicondylitis.³

Using the *AMA Guides*, Dr. Pratt assigned a 7 percent permanent partial impairment of the left upper extremity at the level of the arm.

Claimant testified she continues to have pain, especially when involved in repetitive motion. Claimant stated the pain ranges from the middle of the left arm above the elbow to the middle of the left forearm. Further, she stated she never had any problems with that area prior to June 14, 2011, nor does she recall receiving treatment for that area prior to June 14, 2011. At the time of the Regular Hearing, claimant was not taking prescription medication. Claimant was released by all doctors and continues to work at respondent.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states in part: "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2011 Supp. 44-508(h) defines burden of proof as follows: "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

³ Pratt IME Report (Dec. 28, 2012) at 5.

K.S.A. 2011 Supp. 44-525(a) states, in part:

No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

K.S.A. 2011 Supp. 44-510h(e), states:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

1. Was claimant's June 14, 2011, accidental injury the prevailing factor causing claimant's injury, medical condition, and disability?

In her regular hearing testimony, claimant described an injury to her left upper extremity while pulling a dish cart that weighed approximately 200 pounds. Claimant testified that she had never had treatment for the middle upper or middle lower left arm prior to the described incident. As a result of the injury, she first received treatment from several different physicians. Claimant's testimony is uncontroverted.

Dr. Pratt, in his IME report, wrote that claimant developed left distal arm symptoms in relationship to vocationally related activities on June 14, 2011. Dr. Pratt assessed an impairment rating of seven percent to the left upper extremity. Dr. Carabetta also examined claimant at the request of the ALJ. Dr. Carabetta, like Dr. Pratt, recorded a work-related history of injury leading to pain complaints. Dr. Carabetta assigned a one percent impairment rating for claimant's left upper extremity. Neither Dr. Pratt nor Dr. Carabetta addressed the issue of prevailing factor.

Dr. Zimmerman, in his written report, wrote the June 14, 2011, work-related injury was the prevailing factor causing claimant's left triceps strain and probable medial and

lateral epicondylitis. In his testimony, Dr. Zimmerman confirmed that the injury, as described by claimant, was the prevailing factor causing her impairment, need for treatment, and related disabilities. Dr. Zimmerman's prevailing factor opinion is also uncontroverted.

The prevailing factor is the primary factor, in relation to any other factor. There is no evidence in the record that would establish that the work-related accidental injury, as described by claimant, is not the prevailing factor for her need for medical treatment and disability. The uncontroverted evidence in the record supports only a finding that claimant's work-related accidental injury is the prevailing factor causing claimant's need for medical treatment and permanent impairment.

2. What is the nature and extent of claimant's disability?

Three physicians provided opinions on the extent of impairment resulting from claimant's injury by accident. The ALJ averaged the three to arrive at 9.66 percent impairment to the left upper extremity. The Board has concluded on numerous occasions in prior opinions that it is appropriate to average the ratings provided by the doctors.⁴

In averaging the impairments, the ALJ included Dr. Carabetta's one percent impairment rating. Dr. Carrabetta wrote "there were no objective findings upon which to gauge claimant's condition and utilize the *AMA Guides*." Dr. Carabetta then assessed a one percent impairment outside of the *AMA Guides*.

K.S.A. 2011 Supp. 44-510d(b)(23) requires impairment ratings to be "based upon permanent impairment of function . . . as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein." Two physicians other than Dr. Carabetta assessed an impairment rating for claimant's left upper extremity based upon the *AMA Guides*. Dr. Carabetta's opinion, based upon the *AMA Guides*, is claimant has a zero percent impairment.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its

⁴ *Morales v. International Paper Company*, Docket No. 1,057,820, 2013 WL 6920082 (Kan. WCAB Dec. 20, 2013), See also *Phillips v. State of Kansas*, No. 1,045,139, 2010 WL 1918581 (Kan. WCAB Apr. 14, 2010).

own determination.⁵ In this case, the evidence supports the ALJ's conclusion that claimant experiences a 9.66 percent impairment of function to the left upper extremity.

3. Is claimant entitled to future and unauthorized medical care?

Dr. Carabetta wrote that the use of over-the-counter naproxen may be a good alternative for claimant for long-term management of her condition. Dr. Pratt had no recommendations for future medical treatment in addition to the Relafan, Tramadol and Lidoderm already being used by claimant for discomfort. Dr. Zimmerman wrote that claimant would need additional medical treatment in the form of non-steroidal anti-inflammatory medications like the ones currently taken by claimant. Dr. Zimmerman also recommended steroid and local anesthetic injections.

The weight of the evidence supports claimant's need for future medical treatment.

CONCLUSION

Claimant's June 14, 2011, accidental injury was the prevailing factor causing her injury, medical condition and disability. Claimant has a 9.66 percent impairment of function to the left upper extremity. Claimant is entitled to future medical care upon application to the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 5, 2013, is affirmed.

IT IS SO ORDERED.

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, 215 (1991), *rev. denied* 249 Kan. 778 (1991).

Dated this _____ day of January, 2014.

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge